

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

ENRIQUE DIAZ	§	
v.	§	CIVIL ACTION NO. 6:07cv176
DIRECTOR, TDCJ-CID	§	

MEMORANDUM ADOPTING REPORT AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE
AND ENTERING FINAL JUDGMENT

The Petitioner Enrique Diaz, proceeding *pro se*, filed this application for the writ of habeas corpus complaining of the legality of prison disciplinary action taken against him. This Court ordered that the case be referred to the United States Magistrate Judge pursuant to 28 U.S.C. §636(b)(1) and (3) and the Amended Order for the Adoption of Local Rules for the Assignment of Duties to United States Magistrate Judges.

Diaz was convicted of the disciplinary offense of being out of place. He was charged with being in the shower without authorization; Diaz contended that he was allowed in there to use the restroom, and while he was there, the shift changed. In his petition, he says that he was denied a requested witness (Officer Fitzgerald), that there was no evidence to support the finding of guilt, and that he was punished for “reliance on official authority and permission.” He also says that he was subjected to cruel and unusual punishment.

The Magistrate Judge ordered the respondent to answer the petition and received copies of the state court records. On December 5, 2007, the Magistrate Judge issued a Report recommending that the petition be denied. The Magistrate Judge concluded that the evidence, including the statement of the charging officer and of Officer Lester, was sufficient to support the finding of guilt, that Diaz failed to show that he had been subjected to cruel or unusual punishment, and that the denial of Officer Fitzgerald as a witness was not a constitutional violation because the request to call

Fitzgerald was untimely, Fitzgerald's anticipated testimony did not concern events which occurred on the day in question, and this testimony would have been cumulative of evidence received at the hearing. The Magistrate Judge also recommended that Diaz be denied a certificate of appealability *sua sponte*.

Diaz filed objections to the Magistrate Judge's Report on December 13, 2007. These objections contend that the Magistrate Judge should not have relied upon Officer Lester's testimony because this testimony was based on an "arbitrary and false presumption," it was impossible for Diaz to leave the shower before he actually did, he had permission to enter the restroom, and he should not be punished for reasonably relying on the permission which he had received.

The federal district court cannot make a *de novo* factual review of the evidence presented at a prison disciplinary hearing. Smith v. Rabelais, 659 F.2d 539, 545 (5th Cir. 1981). Diaz's objections largely repeat the defenses which he presented at the disciplinary hearing. This Court cannot second-guess the credibility determinations made by the disciplinary hearing officer. *See McCrae v. Hankins*, 720 F.2d 863, 868 (5th Cir. 1983) (in the context of prison disciplinary proceedings, the Constitution requires due process, not error-free decision-making); *accord*, Superintendent, Massachusetts Correctional Institution v. Hill, 472 U.S. 445, 457 (1985). Diaz has not shown any valid basis for setting aside the decision of the disciplinary hearing officer, and so his objections to the Report of the Magistrate Judge are without merit.

The Court has conducted a careful *de novo* review of the pleadings in this cause, including the original petition, the answer of the Respondent, the Petitioner's response to the answer, the state court records, the Report of the Magistrate Judge, the Petitioner's objections thereto, and all other pleadings, documents, and records in the case. Upon such *de novo* review, the Court has concluded that the Report of the Magistrate Judge is correct and that the objections of the Petitioner are without merit. It is accordingly

ORDERED that the Petitioner's objections are overruled and that the Report of the Magistrate Judge is ADOPTED as the opinion of the District Court. It is further

ORDERED that the above-styled application for the writ of habeas corpus be and hereby is DISMISSED with prejudice. It is further

ORDERED that the Petitioner Enrique Diaz is hereby DENIED a certificate of appealability *sua sponte*. Finally, it is

ORDERED that any and all motions which may be pending in this action are hereby DENIED.

So ORDERED and SIGNED this 21st day of December, 2007.

A handwritten signature in black ink, appearing to read 'Leonard Davis', written over a horizontal line.

**LEONARD DAVIS
UNITED STATES DISTRICT JUDGE**